No. 87-604

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN A. SCHEXNIDER and ALLISON SCHEXNIDER
Respondents

versus

McDERMOTT INTERNATIONAL, INC.,
McDERMOTT, INC. and
INSURANCE COMPANY OF NORTH AMERICA
Petitioners

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

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QUESTION PRESENTED

Did the United States Fifth Circuit Court of Appeals misapply the standards of *Gulf Oil Corp. v. Gilbert* in overturning the United States District Court for the Western District of Louisiana's decision to transfer an Australian law case to Australia under the doctrine of *forum non conveniens*?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below iv

Jurisdiction v

Statement of the Case 1

Statement of the Facts 4

Argument 5

A. This Court's ruling in *Gulf Oil Corp.* was not followed by United States Fifth Circuit Court of Appeal. 5

Conclusion 9

TABLE OF AUTHORITIES

Pages

Cases:

Bilyk v. Vessel Nair, 754 F.2d 1541 (9th Cir. 1985). 9

Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 627 S.Ct. 839 (1947). . . . . i, 5, 6 9, 10

Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518, 627 S.Ct. 828 (1947). 6

Piper Aircraft Co. v. Reyno, 445 U.S. 928, 102 S.Ct. 1296 (1981). 6

Sigalas v. Lido Maritime, Inc., 776 F.2d 1512 (11th Cir. 1985). 7, 8

Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983). 9

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Louisiana, Lake Charles Division, is unreported, but appears as App. A, infra, pp. 1a-13a. The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 817 F.2d 1159 and appears as App. B, infra, pp. 1b-12b.

JURISDICTION

The judgment of the court below (App. A, infra, pp. 1a - 13a) was entered on May 29, 1987. An appeal was taken to the U.S. Fifth Circuit Court of Appeal, which affirmed in part and reversed in part in a decision rendered on May 29, 1987, and reported at 817 F.2d 1159 (App. B, infra, pp. 1b - 12b). An application for rehearing was denied on July 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

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PETITIONER'S BRIEF

Petitioners, McDermott, Inc. and McDermott International, Inc., respectfully submit this Brief to the Petition for Writ of Certiorari filed herein.

STATEMENT OF THE CASE

John A. Schexnider, a United States citizen, filed a seaman's complaint on December 20, 1981, in United States District Court for the Western District of Louisiana, pursuant to the Merchant Marine Act of 1920, 46 USC Section 688, and general maritime law against McDermott International, Inc. and McDermott, Inc.

The suit alleged that Schexnider was injured in a slip and fall accident on April 12, 1981, while a member of the crew of the Derrick Barge 21 (DB21), located off the coast of Indonesia. The DB21 is an Australian vessel flying the Australian flag, owned by an Australian corporation, and chartered to a Singaporean corporation. The complaint was amended on June 18, 1982, to add Allison Schexnider as a party plaintiff based on a loss of society claim. An answer was filed on behalf of McDermott International, Inc. and McDermott, Inc. on February 17, 1982.

During the course of discovery, defendants deposed plaintiffs' expert and learned that the expert believed American law and regulations applied to the Australian Flagship DB21. On September 20, 1985, counsel for defendants advised plaintiff it was their contention Australian law would apply in this matter. An amended answer was filed on September 24, 1985.

On November 4, 1985, defendants filed a motion to dismiss based on *forum non conveniens*. The Trial Court initially denied defendants' motion to dismiss. On April 3, 1986, defendants filed a motion for re-argument of their motion for choice of law and motion to dismiss.

On its own motion the Trial Court upset the April 21, 1986, trial date and gave plaintiffs time to file an additional brief on the *forum non conveniens* issue. Plaintiffs responded by filing a fourth supplemental and amending complaint alleging that Australian law and/or Indonesian and/or Singaporean law applied and alternatively asked the court to retain the matter but try it under the foreign law.

Plaintiffs also attempted to add as defendants McDermott Australia Ltd., the owner of the DB21, the McDermott Southeast Asia PTE, Ltd., the charterer of the vessel. On June 3, 1986, the court dismissed the action against

McDermott Southeast Asia and McDermott Australia for failure to prosecute the action against those defendants.

In an opinion rendered on June 23, 1986, the Trial Court found that Australian law governed the case and conditionally dismissed plaintiff's action as to the defendants.[1]

The trial judge correctly found that the absence of the vessel owner and charterer from the lawsuit was a highly significant consideration and served to tip the scale strongly in favor of dismissal. Furthermore, in granting the dismissal under *forum non conveniens*, the trial judge noted:

> [T]his court sits without an inkling as to the content of the law which it will be required to apply . . . it sits in the dark as to how the matter should proceed under the governing Australian law.

Plaintiffs then filed a motion to stay judgment and notice of appeal on July 17, 1986.

On May 29, 1987, the United States Fifth Circuit Court of Appeal affirmed the decision that Australian law should apply but reversed the decision that this matter should be dismissed and transferred on the grounds of *forum non conveniens*. Plaintiffs timely filed a petition for rehearing which was denied on July 15, 1987.

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1. **The conditions were these: the defendants agree to submit to the jurisdiction of Australian courts, agreee to waive all statute of limitations and laches defenses, agree to satisfy any judgment rendered by Australian courts, and agree that all depositions taken in the present matter would be admissible in the Australian courts. The defendants agreed to the terms and conditions specified in the judgment above-referenced.**

STATEMENT OF THE FACTS

The plaintiff, John A. Schexnider, filed a Jones Act claim for negligence and also alleged unseaworthiness of the Australian Derrick Barge 21 (DB21) under general maritime law. Schexnider, an American citizen, accepted his employment through McDermott International, Inc., a Panamanian corporation, to work on the vessel in the Java Sea off the coast of Indonesia.

The DB21 had been built in Australia for an unrelated company and was later purchased by McDermott Australia, Ltd. The vessel flew the Australian flag, followed Australian Department of Transport (equivalent to U.S. Coast Guard) guidelines, and was annually inspected by the Australian Department of Transport. The vessel never entered United States waters.

The DB21 was the only derrick barge of its type registered in Australia. On the date in question, the vessel was chartered by McDermott Southeast Asia PTE, Ltd. and was laying a pipeline in the Java Sea off the coast of Indonesia. McDermott Australia, Ltd. and McDermott Southeast Asia PTE, Ltd. are foreign corporations but are wholly-owned subsidiaries of McDermott, Inc.

ARGUMENT

A. This Court's ruling in *Gulf Oil Corp.* was not followed by United States Fifth Circuit Court of Appeal.

The doctrine of *forum non conveniens* is applicable in cases where the courts have determined that the law of a foreign nation is the correct choice of law to be applied to matters brought before United States courts. In this case, both the Trial Court and a unanimous panel of the United States Fifth Circuit Court of Appeal have determined that Australian law is the applicable law. However, the Fifth Circuit has abandoned the wide discretion left to a trial judge to decide whether he should assume the burden of delving into Australian law.

Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 627 S.Ct. 839 (1947) sets out the considerations to be used in determining whether or not the United States courts should hear a case under foreign law. This Honorable court found that the determining factors include the relative ease of access to the sources of proof, the availability of compulsory process, the cost of obtaining the attendance of winesses, the possibility of view of the premises, the enforceability of a judgment, the administrative difficulties of the district court, and the fact that "jury duty is a burden that ought not be imposed upon the people of the community which has no relation to the litigation." This Honorable Court further stated in *Gilbert*:

> There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems and conflict of law, in a law foreign to itself.
>
> 330 U.S. at 509.

In *Piper Aircraft Co. v. Reyno*, 445 U.S. 928, 102 S.Ct. 1296 (1981), this court stated:

> The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert*, the public interest facts point toward dismissal where the court would be required to 'untangle' problems in conflicts of laws, and in law foreign to itself.
>
> 102 S.Ct. 252

This court, in *Piper, supra*, further found that the *forum non conveniens* determination is committed to the sound discretion of the trial court. It may only be reversed when there has been a clear abuse of the wide discretion afforded to the trial court. Where the trial court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. See also *Gilbert, supra*, and *Koster v. Lumbermen's Mut. Cas. Co.*, U.S. 518, 627 S.Ct. 828 (1947).

Considering the factors set out under *Gilbert, supra*, the trial court was correct in determining that this case should be transferred to the Australian courts.

Australian Department of Transport Guidelines will have to be applied in determining whether the stairway, which the plaintiffs allege is defective, was properly built pursuant to Australian regulations. It is Australian regulations which will be used in any determination of seaworthiness. Additionally, all inspections of the vessel were performed in Australia by the Australian Department of Transport. Expert witnesses–legal and otherwise–will undoubtly be Australian.

The Fifth Circuit, in the instant case, opined that this matter had been pending and discovery ongoing in the United States courts for five years (in 1987, by the time of the Fifth Circuit opinion) and, as such, should be tried here. The appellate court further found that the matter had been set for trial numerous times and defendants appeared ready and able to try the matter here without inconvenience.

However, the record shows that the issue of choice of law and forum was first raised in 1985 and was referred by the Trial Court to the merits. After the original motion to dismiss was denied, counsel for defendant had no choice but to prepare to try the case before the United States court. The record further shows that the delay cited by the Fifth Circuit Court of Appeal was caused not by the defendants, but by the plaintiff himself–delays which he now seeks to use to his advantage. The matter was scheduled for trial three different times–on December 5, 1983; February 13, 1984; and June 18, 1984–but were all continued at plaintiff's request. The trial was set a fourth time for October 22, 1984, but was continued at defendant's request. The trial was then scheduled for August 26, 1985, but was continued by the Trial Court.

The U.S. Fifth Circuit Court of Appeal opined that the plaintiffs had gone to great expense taking depositions for the trial and that should be a prime consideration in the trial court's determination of whether to dismiss. However, it was upon plaintiff's request that the *forum non conveniens* issue was referred to trial on the merits in the first place. Thereafter, the plaintiffs undertook numerous depositions at great expense to prepare for the trial.

The case of *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985) is on point on this issue. The defendants in *Sigalas* urged the doctrine of *forum non conveniens*, and thereafter the plaintiff undertook extensive depositions and

interrogatories. Sixteen days prior to the pre-trial session, the *Sigalas* defendants filed a motion for summary judgment on the grounds of *forum non conveniens* which was granted by the district court.

The plaintiff in *Sigalas* claimed that the *forum non conveniens* motion was a surprise, and caused her wasted effort and expense. The Eleventh Circuit found there was no surprise and stated:

> [T]he wasted effort argument suggests that appellant was put to great time and expense answering appellee's depositions and interrogatories only to have the merits adjudicated before trial. In fact, it was the appellant who did all the deposing. Appellees did none. The expenses it [plaintiff] incurred were of her own making. An otherwise meritless case may not be boot-strapped past summary judgment merely because the plaintiff expended much effort and money in the preliminary phase of the case.
>
> 776 F.2d 15 1520

This holding would apply in the instant case as the plaintiffs were well aware of the motion to dismiss under the doctrine of *forum non conveniens* filed by the defendants, and requested that the motion be referred to trial on the merits. Thereafter they undertook extensive and expensive discovery procedures.

The trial judge was well within his discretion when granting the motion to dismiss. The United States Fifth Circuit in

Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983), held:

> While the choice of law determination is generally subject to our *de novo* review . . . the *forum non conveniens* determination is committed to the sound discretion of the trial court . . . we may reverse the district court's decision on a motion to dismiss based on *forum non conveniens* only if its action constitutes a clear abuse of discretion.
>
> 696 F.2d at 384-385

Thus, in the present case, the trial court should be afforded wide discretion in applying the doctrine of *forum non conveniens*. The trial judge clearly had all the facts of the matter, gave plaintiffs adequate time to file numerous briefs on their behalf, but after considering the guidelines set out by this court in *Gilbert, supra*, found that the appropriate place for the trial to be held was in Australia.

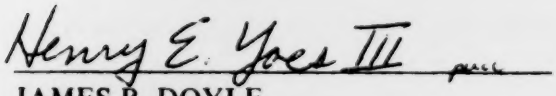
CONCLUSION

The guidelines set out in *Gilbert, supra*, are the correct standards to be applied under the doctrine of *forum non conveniens*. Once these factors have been properly applied, as in the present case, the wide discretion of the trial court should not be reversed. Clearly, the trial court had all factors of the case before him and gave the plaintiffs great latitude in filing memorandums and amending pleadings in order to present their opposition. The fact that plaintiff is an American citizen should be given little or no weight in the weighing of the factors, but even this factor alone cannot tip the scales in his favor when applied against the numerous other factors to be considered under the doctrine of *forum non conveniens*. See *Bilyk v. Vessel Nair*, 754 F.2d 1541 (9th Cir. 1985).

It is submitted that the trial judge's interpretation of the doctrine of *forum non conveniens* was consistent with the jurisprudence of the United States. The wide discretion given to a trial judge in a matter such as this should not be disturbed unless a clear abuse of that discretion can be shown. Such is not the case here as plaintiffs have not shown that transfer of this case to Australian courts would be a hardship, nor have they shown that the guidelines set out in *Gilbert, supra*, tipped the scales in their favor to keep this matter within the jurisdiction of the United States courts. As such, the ruling of the trial judge granting the defendant's motion to dismiss on grounds of *forum non conveniens* should be upheld.

Respectfully submitted,

WOODLEY, BARNETT, WILLIAMS,
FENET, PALMER & PITRE



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APPENDICIES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 81-2358

JOHN A. SCHEXNIDER

VS.

McDERMOTT INTERNATIONAL, INC.,
and McDERMOTT, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
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VERON, J.

RULING UPON DEFENDANTS' MOTION TO DISMISS

This matter is before the Court upon the motion of defendants to dismiss the plaintiff's cause of action upon the grounds of plaintiff's failure to state a cause of action upon which relief can be granted and upon the grounds of forum non conveniens. Because the Court has carefully considered matters outside of the pleadings, the motion shall be treated as one for summary judgment pursuant to Rule 56(c). *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240, 1244 (3d Cir. 1980); Fed R. Civ. Pro. 12(b); *see Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 860 (5th Cir. 1983). In considering the motion pursuant to Rule 56, the Court has considered all of the facts and the inferences to be drawn therefrom in a light most favorable to the plaintiff.

I. FACTS

Plaintiff John A. Schexnider is an American citizen who alleges injury while serving as a crewmember of the Derrick Barge 21 ["DB 21"] on April 12, 1981, while performing work in the Java Sea off the coast of Indonesia. At the time of his accident, plaintiff was working pursuant to an employment contract with McDermott, International, Inc., a Panamanian corporation, which had been entered into in New Orleans, Louisiana on March 6, 1981 and which called for plaintiff to work "in the Southeast Asia Area."

During the plaintiff's service aboard the DB 21, the vessel flew the flag of Australia. The DB 21 was originally built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time has the DB 21 ever been within the territorial waters of the United States. At the time of the accident, the DB 21 was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States although they are wholly owned subsidiaries of McDermott International, Inc. and McDermott, Inc., respectively. After perceiving the correct posture of the parties, plaintiff moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia, Pte., Ltd., as party defendants, but they recently have been dismissed pursuant to Rule 4(j)[1].

---

1. Fed. R. Civ. Pro. 4(j) provides:

> (j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall be* dismissed as to

II. APPLICABLE LAW

A. Standard of Review

In determining the merits of defendants' motion to dismiss pursuant to the doctrine of forum non conveniens, this Court must first ascertain whether American or foreign law governs the lawsuit. If foreign law applies and the foreign forum is accessible, the Court must then determine in which forum the case should be tried. A finding that the lawsuit should be tried in the foreign forum warrants dismissal because the Court should decline to exercise jurisdiction over the dispute. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384, *reh. denied* 710 F.2d 207 (5th Cir. 1983).

B. Choice of Law

It is well established that this Court is to rely upon the eight *Lauritzen-Rhoditis* factors developed by the Supreme Court in making it initial determination of whether United States or foreign law applies. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97

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1. (Continued)

> that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule. (Emphasis added.)

Because plaintiff failed to serve these two foreign corporations within the time period prescribed by this rule, they have been dismissed as party defendants. Counsel for defendants maintains that plaintiff was unable to obtain proper service on these corporations, *ab initio*, since they have no minimum contacts with the United States.

L.Ed. 1254 (1953). The eight factors specified in *Lauritzen-Rhoditis* are: (1) the place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the accessibility of a foreign forum; (7) the law of that forum; (8) the shipowner's base of operation.

In the case at bar, several of the *Lauritzen-Rhoditis* factors are easily decided in favor of foreign law.[2]

1. Place of the Wrongful Act - - -

At the time of plaintiff's injury, the ship was located in the Java Sea off of the coast of Indonesia. While the Supreme Court in *Lauritzen* noted that the test of location of the wrongful act is of limited application to shipboard torts because of the varieties of legal authority over waters the ship may navigate, 345 U.S. at 583, 73 S.Ct. at 929, it is highly significant that the ship on which the injury occurred has *never* navigated the territorial waters of the United States. *See Fajardo, supra*, 707 F.2d at 861. Thus, the locality test affords no support whatsoever for the application of American law in this case. Moreover, insofar as a portion of plaintiff's unseaworthiness claim relates to the angle at which a staircase was built on the DB 21, it would be appropriate to apply the law of state where the DB 21 was constructed - - - Australia.

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2. It is well established that the *Lauritzen-Rhoditis* factors are applicable in determining jurisdiction of claims asserted under the General Maritime Law of the United States as well as under the Jones Act. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84, 79 S.Ct. 468, 485-86, 3 L.Ed.2d 368 (1959); *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861 (5th Cir. 1983).

2. **Law of the Flag - - -**

The flag of the vessel aboard which the plaintiff was injured flew the flag of the country which spirited the America's Cup away from Newport, Rhode Island in 1983. Contrary to the plaintiff's assertion that the Australian flag was merely a "flag of convenience," the evidence illustrates that the ship was built according to Australian regulations and was owned by an Australian corporation.[3] The Supreme Court has recognized that the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law ... unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 585-86, 73 S.Ct. at 929-30; *Rhoditis, supra*, 398 U.S. at 313, 90 S.Ct. at 1736 (Harlan, J., dissenting). As appears from the facts of this case, there are no such counterweights which favor the application of American law.

3. **Allegiance or Domicile of the Injured Seaman - - -**

The United States has an interest in seeing that its citizens not be maimed or disabled from self-support, and in seeing that its citizens who work abroad are adequately protected. It is also true that a seaman takes his employment where he can find it, and as the foreign Australian forum is presumed capable of providing plaintiff a remedy for any wrong suffered, this interest will be adequately served.

4. **Allegiance of the Defendant Shipowner - - -**

The owner of the DB 21 is McDermott Australia, Ltd., an Australian corporation which exercises local control over the operations of its ships. Obviously, this factor supports the application of Australian law.

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3. I.e., McDermott Australia, Ltd.

5. Place of Contract - - -

Plaintiff entered into his employment contract with defendant McDermott International, Inc., a Panamanian corporation, in New Orleans. The contract specifically provides, however, that the employment is to be in "the Southeast Asia Area." The Supreme Court has observed that the place of contracting for employment as a seaman is generally fortuitous. Moreover, as the Supreme Court has observed:

> The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hiring in ports of countries that take best care of their seaman. *Lauritzen, supra*, 345 U.S. at 588, 73 S.Ct. at 931.

In this instance, the plaintiff specifically contemplated working in Southeast Asia at the time he entered the contract, and it will certainly not be contrary to the expectation of the parties to find that the law of a country in that part of the world will govern plaintiff's claims.

6. Inacessibility of Foreign Forum - - -

The parties do not dispute that Australian courts are available to provide the plaintiff an adequate legal remedy.

7. The Law of the Australian Forum - - -

The Fifth Circuit has consistently recognized that the law of a foreign forum is to be presumed adequate, "unless

the plaintiff makes some showing to the contrary, or unless conditions in the forum otherwise made known to the court, plainly demonstrate that the plaintiff [] [is] highly unlikely to obtain basic justice therein." *Vaz Borralho, supra*, 696 F.2d at 393-94; *see also McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313, 1319 (5th Cir. 1986). Plaintiff has made no such showing in this case.

8. Shipowner's Base of Operations - - -

While the DB 21 is owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd. at the time of plaintiff's injury, plaintiff urges the Court to "look through the facade of foreign incorporation to the ownership behind" McDermott Australia, Ltd. *See Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1032 (5th Cir. 1984). As discussed above, McDermott Australia, Ltd., the Australian corporation which owned the vessel, as well as McDermott Southeast Asia, Pte., Ltd., the Singaporean corporation which had chartered the vessel to perform work in laying a pipeline in the Java Sea, are wholly owned subsidiaries of McDermott International, Inc., which is a Panamanian corporation. In turn, McDermott International, Inc. is a wholly owned subsidiary of McDermott, Inc., an American corporation. Because the ultimate parent corporation, defendant McDermott, Inc., is American, the plaintiff contends that the shipowner's real base of operations is the United States. Plaintiff furthermore points out that the vessel is surveyed by a marine equipment coordinator employed by McDermott, Inc. who maintains his office in New Orleans. In addition, plaintiff contends that because the defendant, Insurance Company of North America ["INA"] insures all McDermott corporations and subsidiaries, and because INA is an American corporation, that there is further justification for finding an American base of operations.

Defendants, on the other hand, cite deposition testimony which clearly shows that the day-to-day operation of the DB 21 was controlled locally, i.e., by the charterer McDermott Southeast Asia, Pte., Ltd., and, to a lessor extent, the vessel owner McDermott Australia, Ltd. Furthermore, whenever the McDermott, Inc. marine equipment coordinator went to supervise the operation of the DB 21, he would be paid by McDermott Australia, Ltd. for his work just as an outside company would be paid. Deposition of Walter Hazard, p.p. 56-58.

The crux of this determination "involves the ascertainment of the facts or groups of facts which constitute contacts between the transactions involved in the case and the United States, and then deciding whether or not they are substantial." *Rhoditis, supra*, 398 U.S. at 309, n.4, 90 S.Ct. at 1734, n.4, *quoting with approval Bartholomew v. Universe Tank Ships, Inc.*, 263 F.2d 437, 441 (2d Cir.), *cert. denied* 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959). It is clear from the facts of the case that the operational activities of the DB 21 on the date of the plaintiff's injury had no contacts whatsoever with the United States. The vessel was originally constructed in Australia in accordance with Australian Government regulations, it flew the Australian flag, it was owned by an Australian Company, and it was chartered to a Singaporean company which oversaw its day-to-day operations in the Java Sea off Indonesia.

In order to find an American base of operations, "[t]he necessary operational contacts with the United States must relate to both the shipowner *and the ship* . . . and must be substantial." *Sosa, supra*, 736 F.2d at 1032 (emphasis added; citations omitted). Obviously, there are no substantial contacts with the United States, and the Court thus finds that the shipowner's base of operations is Australia. *Cf. Sosa, id.* at 1031 (where "many of the wrongful acts took place in the United States and this weigh[ed] in favor of applying American law").

The Court furthermore rejects as without merit the plaintiff's contention that the fact the Insurance Company of North America insures the Australian subsidiaries as well as other McDermott companies makes the shipowner's contacts with the United States "substantial." There is no authority whatsoever for this proposition and the Court furthermore notes that there is nothing within the law of admiralty which authorizes a direct action against a shipowner's insurer. *Cf. Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986) (holding that a direct action may be maintained against an insurer if the law of the forum state so allows, but furthermore recognizing that federal admiralty law confers no general right to sue an insurance company directly).

While the Supreme Court has recognized that the *Lauritzen-Rhoditis* factors may not be applied in a purely mechanical fashion, it is clear from a consideration of all of the facts of the case that no substantial nexus exists between the present forum and the case at bar. The most significant contacts lie in the "Land Down Under," and Australian law therefore governs the controversy.

C. Forum Non Conveniens

Having determined that Australian law applies to this action, the Court next considers whether those factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947), favor dismissal or retention of the case. One factor in favor of retaining jurisdiction is that the plaintiff has already deposed particular witnesses in Singapore who would not be available to compulsory process within this Court's jurisdiction. On the other hand, the Court notes that they would most likely not be subject to any compulsory process of Australian courts either. Another consideration is that plaintiff is a resident of The Western District of Louisiana–Lake Charles Division and has undergone medical

treatment in the local area. While plaintiff contends that his liability experts are residents of the United States, this argument is premised upon the erroneous assumption that American law will govern the controversy. The Court has also considered the age to which this case has grown before the Court, but specifically notes that this has been due not only to its overly congested docket but also because of requested trial continuances by counsel for the plaintiff.

Factors weighing in favor of dismissal include the complex and difficult task faced by this Court in finding and applying Australian law to the instant controversy. Following this Court's preliminary determination that Australian law would govern this case, it invited counsel to its chambers for a status conference at which time plaintiff's counsel was admonished that he faced potential dismissal of his entire suit pursuant to Rule 12(b)(6) because he had not asserted any cause of action arising under Australian law. *See Vaz Borralho, supra*, 696 F.2d at 390-91 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, 1020 n.7, *reh denied* 659 F.2d 1075 (5th Cir. 1981), *cert. denied* 445 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982). Rather than allege any specific cause of action arising under Australian law, however, plaintiff instead chose to amend his complaint so as to read: "In the alternative, the plaintiffs allege that if the law of the United States is not applicable to the accident of April 12, 1981, that the law of Australia and/or Indonesia and/or Singapore is applicable in all respects." Plaintiff has provided no indication whatsoever as to any specific cause of action which he may have under Australian law and this Court currently sits without an inkling as to the content of the law which it will be required to apply. In this vein, the Court has no idea whether or not plaintiff is entitled to a jury trial and it sits in the dark as to how the matter should proceed under the governing Australian law.

Another significant factor favoring dismissal is the unavailability of any remedy which the plaintiff may have against McDermott Southeast Asia, Pte., Ltd. and/or McDermott Australia, Ltd. in this court. As previously noted, the plaintiff was unable to secure service upon those companies within the time period prescribed by Federal Rule of Civil Procedure 4(j) and his action against them consequently has been dismissed without prejudice. Certainly, McDermott Australia, Ltd. is subject to the jurisdiction of Australian courts and it has furthermore been represented that McDermott Southeast Asia, Pte., Ltd., having entered into the DB 21 charterparty with McDermott Australia, Ltd., would have the requisite minimal contacts with Australia to be subject to its jurisdiction. Certainly, the absence of the vessel owner and charterer from the lawsuit is a highly significant consideration, and serves to strongly tip the scale in favor of dismissal.

Factors of public interest also favor dismissal of the action. As noted by the Supreme Court in *Gilbert*: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gilbert, supra*, 330 U.S. at 508, 67 S.Ct. at 843. Certainly, plaintiff's action cannot be said to have originated in the Western District of Louisiana. Moreover, the plaintiff seeks a trial by jury and, while the Court is unsure of whether he would be entitled to one under Australian law, this Federal District Court has been directed by the Administrative Office of the United States Courts that all civil jury trials must be suspended through the end of the fiscal year or until additional funds are made available, as a result of, inter alia, the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act. In addition, there is no way in which this case could be considered to be "a localized controversy" in which the citizens of the community would have any interests whatsoever. As such, the Court finds that the *Gilbert* factors strongly favor dismissal of the action.

Accordingly the Court determines that dismissal on the grounds of forum non conveniens is warranted, provided that the defendants: (1) agree to submit to the jurisdiction of Australian Courts and submit to service of process in an appropriate Australian court within sixty (60) days of the date of this order; (2) agree to wave all statute of limitations and laches defenses; (3) agree to satisfy any judgment rendered by the Australian courts; and (4) agree that any and all depositions taken in the present matter shall be admissable as evidence for consideration by the Australian court should defendants fail to meet any of these conditions, this Court will resume jurisdiction over the case.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 23rd day of June, 1986.

s/s Earl E. Vernon
EARL E. VERNON
UNITED STATES DISTRICT JUDGE

APPENDIX B

John A. SCHEXNIDER,
Plaintiff-Appellant,

v.

McDERMOTT INTERNATIONAL, INC., et al
Defendants-Appellees.

No. 86-4506.

United States Court of Appeals,
Fifth Circuit.

May 29, 1987.

Rehearing and Rehearing En Banc
Denied July 15, 1987.

American seaman brought action against Australian shipowner and charterer for injuries sustained on board ship. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., dismissed suit, and seaman appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) Australian law, and not American law, applied where law of flag was Australian, ship was built in Australia according to Australian standards, and Australian courts and law were available to provide relief, and (2) dismissal on forum non conveniens grounds was abuse of discretion where trial in Australia would be hardship to seaman, and Australian defendants were ready and able to have case tried in Louisiana.

Affirmed in part, reversed in part and remanded.

1. **Federal Courts KEY 776**

District court's choice-of-law determination is subject to de novo review by Court of Appeals.

2. **Federal Courts KEY 45, 818**

District court's forum non conveniens determination is committed to sound discretion of district court, and may be reversed only if district court's decision constitutes clear abuse of discretion.

3. **Seamen KEY 3**

Australian law, and not American law, applied to American seaman's maritime action against Australian shipowner and charterer, even though employment contract was made in United States, where ship on which accident occurred flew Australian flag, Australian courts were accessible to provide relief, and ship was built in Australia in accordance with Australian standards.

4. **Federal Courts KEY 105**

There is ordinarily strong presumption in favor of plaintiff's choice of forum that may be overcome only when private and public interest factors clearly point towards trial in alternative forum.

5. **Federal Courts KEY 45**

Dismissal of American seaman's maritime claim against Australian shipowner on forum non conveniens grounds was abuse of discretion, even if court would have difficulty determining applicable Australian law, where trial in Australia would be hardship to seaman, shipowner was ready and able to try case in Louisiana, and extensive pretrial discovery and proceedings had already taken place over five-year period.

6. Federal Courts KEY 45

Need to apply foreign law is not in itself reason to apply doctrine of forum non conveniens.

Joseph J. Weigand, Jr., Houma, La., for plaintiff-appellant.

James B. Doyle, Henry E. Yoes, III and Edmund E. Woodley, Lake Charles, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, JOLLY and HIGGINBOTHAM, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

John Schexnider appeals from the district court's dismissal of his suit against the appellees on *forum non conveniens* grounds. Although we agree with the district court that Australian rather than United States law governs this maritime action, we conclude that the district court did not act within its discretion when it dismissed Schexnider's suit for *forum non conveniens* reasons.

I

The appellant, John A. Schexnider, is an American citizen. He alleges an injury, occurring on April 12, 1981, while serving as a crewmember of the Derrick Barge 21 (DB), which was performing work in the Java Sea off the coast of Indonesia. At the time of his accident, Schexnider was working pursuant to an employment contract with McDermott International, Inc., a Panamanian corporation.

On March 6, 1981, in New Orleans, Schexnider had entered into the contract that called for him to work "in the Southeast Asia Area."

During Schexnider's service aboard the DB, the vessel flew the Australian flag. The DB was built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time had the DB ever been within the territorial waters of the United States. At the time of the accident the DB was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States, although they are wholly owned subsidiaries of McDermott International Inc., and McDermott, Inc. (both U.S. corporations), respectively. After perceiving the correct posture of the parties, Schexnider moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia, Pte., Ltd., as party defendants, but they were dismissed pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

II

On December 28, 1981, Schexnider filed his seaman's complaint against McDermott International, Inc., and McDermott, Inc., (McDermott) pursuant to the Merchant Marine Act of 1920, 46 U.S.C. § 688, better known as the Jones Act, and general maritime law, Schexnider alleged that he was injured in a slip and fall accident on April 12, 1981, while working on the DB. In its answer McDermott admitted ownership of the DB. On June 18, 1982 Schexnider filed an amended complaint to add his wife as a plaintiff.

Pretrial proceedings and discovery followed. A trial date was set on several occasions but in each instance the trial was postponed. In April 1986, the defendants moved to dismiss on choice-of-law and *forum non conveniens* grounds. This

motion was granted by the district court in an opinion dated June 23. The court found that Australian law governed the case, and dismissed the case as to the remaining defendants, conditioned upon the defendants agreeing to submit to the jurisdiction of Australian courts and its service of process within sixty days of the date of the order, agreeing to waive all statute-of-limitations and laches defenses, agreeing to satisfy any judgment rendered by the Australian courts and agreeing that any and all depositions taken in the present matter would be admissible as evidence in the Australian courts.

By pleading of July 7, 1986, McDermott, Inc., McDermott International, Inc. and INA agreed to the terms and conditions specified in the judgment. Schexnider filed a motion to stay and a notice of appeal on July 17.

III

[1, 2] Resolution of this appeal requires us to determine whether the district court abused its discretion by dismissing Schexnider's suit on *forum non conveniens* grounds. First the court determines that United States law does not apply, and then the court balances public and private convenience factors set forth in judicial precedent to determine whether to dismiss the case. While the district court's choice-of-law determination is subject to *de novo* review by the court of appeals, *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983), the *forum non conveniens* determination (i.e., the balancing of public and private factors) is committed to the sound discretion of the district court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). We may reverse a district court's decision on a motion to dismiss based on *forum non conveniens* only if its action constitutes a clear abuse of discretion. *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67; *Bailey*, 697 F.2d at 1274.

[3] The district court correctly determined that Australian law applied to Schexnider's suit. The determination of the law governing this maritime action is made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and further elaborated in *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) (these factors have become known as the *Lauritzen-Rhoditis* factors). They are:

1. the place of the wrongful act;

2. the law of the flag;

3. the allegiance or domicile of the injured seaman;

4. the allegiance of the defendant shipowner;

5. the place where the contract was made;

6. the accessibility of the foreign forum;

7. the law of the forum;

8. the base of operations.

See Rhoditis, 398 U.S. at 308-09, 90 S.Ct. at 1733-34. The significance of these factors must be considered in the light of the national interest to be served by assertion of Jones Act jurisdiction. *Id.* at 309, 90 S.Ct. at 1734. In this case, the district court concluded that the application of these factors weighed in favor of applying Australian law. While the court found that the domicile of the injured party was in the United States, and his employment contract was made in the United States, the other factors favored applying Australian law. The district court found that the ship on

which the accident occured flew the Australian flag, the allegiance of the defendant shipowner was Australian, Australian courts were accessible to provide relief, Australian law was presumed adequate since the plaintiff had not shown otherwise, and the shipowner's base of operations was abroad. The district court also found that the ship was never intended to and never did sail in American waters, and that while the plaintiff did sign on for work in this country, the employment contract specifically provided that employment was for the "Southeast Asia area."

Of particular significance in this case is the fact that the ship on which Schexnider was injured flew the Australian flag. The law of the flag is given *great* weight in determining the law to be applied in maritime cases. As the Supreme Court has held, the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law . . . unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 73 S.Ct. at 929. The district court found that under the facts of this case, heavy counterweights which favored applying American law did not exist. We agree.

Furthermore, a related consideration is that the DB was built in Australia, and in accordance with Australian standards. This clearly favors the application of Australian law since part of Schexnider's unseaworthiness claim relates to the way in which the staircase was built on the DB. In addition, the district court presumed, without challenge, that the Australian courts would be available and adequate for the litigation of this case. The principal factor favoring the application of American law is the fact that Schexnider is a United States citizen. But this is not sufficient to outweigh the factors favoring the application of Australian law, especially the law of the flag. Schexnider also argues that the fact that the ultimate parent corporation (the DB is owned by a subsidiary of subsidiary), McDermott, Inc., is an

American corporation, militates in favor of applying American law. But we do not regard as significant the fact that McDermott, Inc. is an American corporation given the fact that the day-to-day operations of the vessel were, according to the district court, controlled by McDermott's Southeast Asian and Australian subsidiaries.

The preponderance of the *Lauritzen-Rhonditis* factors clearly favors the application of Australian law. First, and perhaps most important, the law of the flag is Australian. Furthermore, the DB was built in Australia according to Australian standards, the day-to-day operations of the DB were governed in part by an Australian subsidiary of McDermott, and Australian courts and law are available to provide relief. By was of contrast only the fact that Schexnider is a United States citizen clearly favors the application of American law. Given the heavy balance in favor of applying Australian law, we agree with the district court that Australian law governs Schexnider's lawsuit.

IV

We do, however, find that the district court abused its discretion when it dismissed Schexnider's suit on *forum non conveniens* grounds. The determination whether an action should be dismissed on *forum non conveniens* grounds involves a balancing of public and private interest factors as set out by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947):

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpenseive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other

> forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-509, 67 S.Ct. at 843.

[4, 5] Although it is true that an appellate court may reverse a district court's *forum non conveniens* determination only where there has been a clear abuse of the district court's discretion, *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67, it is also true that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. *Id.* at 255, 102 S.Ct. at 265-66.[1] In this case the private and public interest factors do not point clearly toward trial in Australia.

Trial in Lake Charles, Louisiana, is clearly convenient for the plaintiff, who is a citizen and resident, especially when many of the plaintiff's witnesses are also in this country. Moreover, a trial in Australia would in all likelihood be a hardship to Schexnider who is apparently not in good health. By way of contrast, the appellees have not shown that a trial in Lake Charles would greatly inconvenience them. From the record, we observe that the appellees were apparently ready and able to have their case tried in Lake Charles. At least in a few instances, the trial date in this case was reset on Schexnider's motion, not the appellees'. We thus conclude that the private interest factors clearly point in favor of having this case tried in the United States.

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1. Schexnider makes much of the fact that he is an American citizen. A citizen's forum choice should not be given dispositive weight, however. *Piper*, 454 U.S. at 256 n. 23, 102 S.Ct. at 266 n. 23. This court has held that a court does not abuse its discretion by not heavily weighting this factor. *Pacific Employees Ins. Co. v. M/V Capt. W.D. Cargill*, 751 F.2d 801, 806 (5th Cir. 1985).

The district court concluded that factors of public interest favored trial in Australia. The district court cited "Gramm-Rudman" problems (federal court budgetary difficulties) and the lack of local interest in this type of case. The Gramm-Rudman energency, as it relates to funding of federal trials, has subsided. Lack of public interest in Schnexider's case would constitute a weightier objection if the litigation of this case were still in its preliminary stages. But extensive pretrial discovery and prodeedings have already taken place over a period of some five years. A trial date has been set several times. Given the extensive nature of the pretrial preparation, a trial in Lake Charles would not burden the district court significantly more than it has already been burdened. Although the local community will be inconvenienced by being pressed into jury duty, the imposition of jury duty is mitigated by the considerations that Schexnider is a citizen of the community and that the trial is not likely to be lengthy.

[6] The district court's principal objection to trying this case in the United States was the difficulty that would be involved in applying Australian law. Although this certainly is a factor weighing in favor of trying the case in Australia, the need to apply foreign law is not in itself reason to apply the doctrine of *forum non conveniens*. *Piper*, 454 U.S. at 260 n. 29, 102 S.Ct. at 268 n. 29; *Manu Intern. S.A. v. Avon Products, Inc.*, 641 F.2d 62, 63 (2d Cir. 1981). As the Second Circuit noted in *Manu*: "We must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform." 641 F.2d at 68.

Because the factors pointing against the strong presumption in favor of the plaintiff's choice of forum in this case are slight, we conclude that the district court abused its discretion by dismissing Schexnider's suit.

V

For the reasons discussed in this opinion, we affirm the district court's determination that Australian law applied in this case. However, we also reverse the district court's dismissal of Schexnider's suit against the appellees. This case is therefore remanded to the district court with instructions to retain jurisdiction and to apply Australian law to Schexnider's maritime claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WEST KEY NUMBER SYSTEM